

9 Official Opinions of the Compliance Board 167 (2014)

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*Topic headings correspond to those in the Opinions Index (2010 edition) at <http://www.oag.state.md.us/opengov/openmeetings/appf.pdf>

September 29, 2014

Re: Mayor and Town Council, Town of Chestertown
Craig O'Donnell, Complainant

This opinion addresses the allegations of Craig O'Donnell, Complainant, that the Mayor and Town Council ("Council") of the Town of Chestertown violated the Open Meetings Act by meeting in closed session on December 16, 2013, and June 16, 2014, without making the disclosures required by the Act and without confining the discussion to the matters disclosed when the Council members voted to close the sessions. Complainant further alleges that the Council committed similar violations as to meetings that the Council's former presiding officer conducted in 2009, 2011, and 2012. We will resolve the complaint about the alleged

practices by addressing the December 16, 2013 and June 16, 2014 meetings.

Disclosure Allegations

The Act permits a public body to meet behind closed doors only to discuss certain topics and only on several conditions. See State Government Article §§ 10-508, 10-509(c)(2). The conditions are as follows: (1) the public body must vote, in open session, on a motion to close that session; (2) at that time, the presiding officer must make or confirm a written statement, or “closing statement,” that discloses each topic to be discussed, and, as to each topic, the statutory authority for closing the session and the public body’s reason for excluding the public from the discussion; and (3) after the closed session, the public body must disclose in the minutes of the public body’s next open session various types of information about what actually transpired during the closed session.

These requirements are not mere technicalities. Rather, each implements the Act’s goal of promoting the public trust in government. The vote on a motion to close the meeting for the reasons stated on the closing statement shows the public that the members have actually considered the need to exclude the public. The identification, on the closing statement, of the topics to be discussed and the statutory authority for discussing each behind closed doors demonstrates the legality of the closed session and provides the public with some information about the business that will be conducted there. And, closing statements, once the members have voted to close the meeting on the basis of the information disclosed in them, become the members’ representation to the public that they will only discuss the disclosed topics and that they will keep the discussion within the confines of the statutory exception that they have claimed.

We have long encouraged public bodies to disclose as much information as possible on their closing statements. We have also suggested that, if staff prepares the statement on a form, the presiding officer sign the form to establish that officer’s compliance with the Act’s requirement that the presiding officer make the written statement. That requirement ensures that the presiding officer is aware of the confines within which the officer must keep the discussion. We have often recommended that officers who preside over closed sessions use the closing statement as the agenda for the session, as any discussion beyond the topics discussed and exceptions claimed will violate the Act.

The complaint alleges, the Town Attorney acknowledges, and we find from the documents provided to us, that the closing statements for the two meetings in question lack information on the topics to be discussed and on the Council’s reasons for excluding the public. The Council thereby violated the Act.

Allegations That the Closed-Session Discussions Exceeded the Statutory Authority Claimed as a Basis for Excluding the Public

December 16, 2013 meeting. The minutes of the Council's December 2013 meeting show that the Council adopted two motions to close the meeting: one to discuss "a police hire and an employment contract," and the other to "discuss a real estate matter." As the statutory authority for closing the session, the Council's closing statement cites two provisions, § 10-508(a)(1) and (3). Section 10-508(a)(1) permits a public body to meet behind closed doors to discuss the "appointment, employment, assignment, promotion, discipline, demotion, compensation, removal, resignation, or performance evaluation" of "appointees, employees, or officials" over whom the public body has jurisdiction. That exception does not extend to a discussion about general staffing needs or policies. Section 10-508(a)(3) permits a public body to close a meeting to "consider the acquisition of real property for a public purpose and matters directly related thereto." That exception does not extend to a discussion about the sale of public property.

The Council provided us with the sealed minutes of the December 16 session, and we find that the topics discussed fell within the exceptions that the Council claimed. The Council's choice about whether to disclose details about one member's decision to recuse herself from voting on the motion to close the meeting does not raise a question under the Act.

June 16, 2014 meeting. The minutes of the June 2014 meeting show that the Council voted to close the meeting "to discuss personnel and a legal matter." The Council cited the personnel exception provided by § 10-508(a)(1) and the exception provided by § 10-508(a)(7), which permits a public body to close a meeting to "consult with counsel to obtain legal advice on a legal matter." At the Council's next open session, the Mayor read a summary that disclosed that the Council had discussed the "Marina manager's contract and a possible legal remedy to the Quaker Neck Sanitary issues." The summary identified as the "persons present" the Council members, the Town Manager, and the Town Clerk. The Council provided us with the sealed minutes of this session.

We find that the discussion of the terms of the manager's employment, to the extent that it pertained to the particular individual and not the Town's general policies, fell within the personnel exception. However, the sealed minutes show that the members also discussed more general staffing matters and other marina-related topics that did not bear on an individual's attributes. We find that the Council's discussion of marina-related matters that did not relate to the manager's personnel information exceeded the narrow scope of the § 10-508(a)(1) exception and so violated the Act.

We also find that the "legal matter" discussion did not fall within § 10-508(a)(7), the exception that the Council claimed, as there was no "legal

counsel” at the session to “consult with.” It appears from the sealed minutes that some of the discussion might have qualified instead for the exception in § 10-508(a)(8), which permits a closed-session discussion of “pending or potential litigation” with staff and does not require the presence of counsel. To the extent that some of the discussion would have fallen within the scope of that exception, we find that the Council violated the Act by closing the meeting on the basis of an inaccurate closing statement. As stated above, the goal of the Act is to promote the public trust in government, and that goal is not served by disclosing to the public that a meeting will be closed to consult with counsel when, in fact, no counsel will attend.

Other parts of the discussion turned to topics that did not fall within the scope of any exception and that the Council should have addressed in open session after receiving information from staff. We find that the Council violated the Act by discussing, in closed session, topics that the Council had not disclosed on the closing statement and that did not qualify for the exceptions that the Council cited. If it becomes apparent, during a closed session, that the exception claimed as the basis for closing the discussion will not apply, the members must stop the discussion until such time as they can either hold it in a properly-noticed open session or vote, in an open session, on an accurate closing statement that states an applicable exception.

Conclusion

With regard to the Council’s closed sessions in December 2013 and June 2014, we have found that the Council violated the Act by failing to make the required disclosures when the members voted to discuss public business behind closed doors. With regard to the June 2014 meeting, we found that the Council violated the Act by claiming an exception that did not apply to the discussion that it held behind closed doors and by addressing, in that closed session, topics to which no exception applied.

Open Meetings Compliance Board

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